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No. 82-1490

In the Supreme Court of the United States

OCTOBER TERM, 1982

EDDIE JAMES CARTHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there was sufficient evidence to establish that petitioner aided and abetted the making of false statements to a federally insured bank.

2. Whether petitioner was the target of selective prosecution.

3. Whether the district court abused its discretion in admitting evidence of events that occurred after commission of the alleged offense.

4. Whether petitioner received effective assistance of counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1983. The petition for a writ of certiorari was filed on March 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted on two counts of making false statements to a federally insured bank, in violation of 18 U.S.C. 1014 and

2.[1] He was sentenced to a one-year term of imprisonment on the first count, to be followed by a two-year term of imprisonment on the second count. In addition, petitioner was fined $5,000 on the second count. The court of appeals affirmed (Pet. App. A1-A9).

1. The evidence presented at trial showed that in late 1977 and early 1978 petitioner, co-defendant Harold Foreman, and co-defendant Robert Bolden planned to obtain several loans from a local bank by falsely claiming that the loans could be secured by the town's pending purchase of equipment for a day care center.[2] At that time petitioner was the mayor of Tchula, Mississippi, Foreman owned a business that sold supplies to government organizations, and Bolden was Director of Minority Affairs in the Mississippi Department of Public Works ("DPW").

In late 1977, petitioner asked Bolden for his assistance in obtaining federal funding for a day care center (I Tr. 172-173). Bolden arranged several meetings with a commissioner of DPW to discuss procurement of funding; in addition, he suggested Foreman as a potential vendor of the equipment needed by the center (I Tr. 173-175). Thereafter, petitioner, Bolden, and Foreman met at Foreman's apartment to discuss purchase of the equipment. Petitioner and Bolden instructed Foreman to write invoices for approximately $40,000 worth of equipment; petitioner then gave Foreman a purchase order from the town of Tchula (I Tr. 97-101). According to the plan devised by the three, Foreman was to present the invoices and purchase order to a

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[1]The indictment charged petitioner with five counts of making false statements, four of which were made on February 9, 1978, and the fifth on February 17, 1978. The trial court granted petitioner's motion to consolidate counts 1 through 4 and instructed the jury to consider those counts as one criminal act (III Tr. 802-807, 857-858).

[2]Co-defendants Foreman and Bolden pleaded guilty prior to trial and testified for the government.

bank in Jackson, Mississippi, as security for a loan, the proceeds of which would be divided among the three men (I Tr. 101-105, 176-179).

Despite the purchase order petitioner gave to Foreman, it was doubtful that the town would fund the order. Prior to Foreman's application for the bank loan, the DPW, during a meeting petitioner attended, had not agreed to fund the equipment listed on the invoices (I Tr. 269-277). On January 24, 1978, petitioner and Bolden met with a DPW commissioner who reiterated that the department had not approved the day care center contract for the equipment purchases (II Tr. 346-354).

Nevertheless, on February 9, 1978, Foreman met with a loan officer at the Jackson bank and presented the invoices and purchase order as security for a loan.[3] The loan officer refused to process the requested loan without a receipt indicating that the equipment described in the documents had been delivered to the town of Tchula. Foreman walked out to the bank's parking lot where Bolden was waiting. Bolden signed petitioner's name to a delivery receipt, which Foreman then gave to the loan officer. The loan officer then called petitioner, who verified that the town of Tchula had funds available to pay the invoices (I Tr. 105-111).

Foreman obtained two loans from the Jackson bank, one on February 9 and one on February 17. After the loans were approved, Foreman deposited the proceeds—$20,047 from the February 9 loan and $12,500 from the February 17

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[3]Foreman and petitioner had previously called the bank and asked about borrowing money to purchase the equipment. The loan officer instructed petitioner to send invoices and the purchase order for the equipment. The bank received these documents enclosed with a letter from petitioner, dated February 6, 1978. However, the loan officer's superiors decided that the loan would be approved only if the bank received delivery receipts signed by petitioner (I Tr. 23-30).

loan—in his checking account. He then cashed $9,000 of the proceeds and delivered $6,000 to Bolden, $2,000 of which was petitioner's share (I Tr. 112-117). Bolden subsequently gave petitioner his part of the loan proceeds and explained that he had signed petitioner's name to the delivery receipts. Petitioner did not object when he was told of the forgery (I Tr. 182-190).

Meanwhile, DPW continued to refuse to fund the purchase of equipment from Foreman for the day care center. A town planner told petitioner that the prices on the equipment list were too high (II Tr. 310-322). In addition, a DPW employee informed petitioner that the list was unacceptable because a contract for the day care center had not yet been signed and because the list did not comply with department procedures (II Tr. 394). The funding was never approved, and the equipment for the center was never delivered to the town of Tchula (I Tr. 189-190; II Tr. 353-354, 405-406, 446). In addition, the bank did not receive repayment of its loan (I Tr. 48-49, 255).

2. The court of appeals rejected petitioner's challenge to the sufficiency of the evidence, noting that the evidence of guilt was overwhelming if the testimony of Bolden and Foreman were believed (Pet. App. A2). The court also concluded (*id.* at A2-A8), based on "a thorough review of the trial record" (*id.* at A7), that petitioner had received effective assistance of counsel. Finally, the court concluded that the jury had been adequately instructed on the elements of the offenses charged (*id.* at A9).

ARGUMENT

1. Petitioner first contends (Pet. 29-33) that the evidence was insufficient to establish that he made false statements to a federally insured bank. However, a reviewing court must sustain a jury verdict if there is substantial evidence, taking the view most favorable to the government, to support it.

Glasser v. *United States*, 315 U.S. 60, 80 (1942). Here the court of appeals concluded that if the jury believed the testimony of Bolden and Foreman, the evidence of petitioner's guilt was "overwhelming" (Pet. App. A2).

Petitioner urges that the only statements shown to be false were the delivery receipts that Foreman presented to the bank and that it was Bolden who signed petitioner's name to them. In petitioner's view, this demonstrates that the scheme to obtain a loan through use of false statements was entirely initiated and carried out by Foreman and Bolden, who used petitioner as an unwitting dupe. This contention lacks merit.

It is clear that petitioner played a significant role in the scheme to obtain the bank loan. Although the DPW and the town of Tchula had not approved the purchase of equipment for the day care center, petitioner instructed Foreman to prepare invoices for it. In addition, petitioner provided the purchase order Foreman delivered to the bank. While Foreman was in the process of applying for the loan, petitioner informed the bank's loan officer that the town had funds available to cover the invoices. After the bank demanded additional documentation, Bolden signed petitioner's name to the delivery receipts. When Bolden informed petitioner of the forgery, petitioner did not object, but instead accepted his portion of the loan proceeds (I Tr. 182-184, 188-189). In these circumstances, the court of appeals was clearly correct in determining (Pet. App. A2) that the evidence, when viewed in the light most favorable to the government, overwhelmingly demonstrated that petitioner aided and abetted the making of false statements to a federally insured bank.

2. Petitioner next contends (Pet. 34-37) that, as a former black mayor, he was the subject of illegal discrimination because co-defendants Foreman and Bolden received lighter sentences than petitioner. Since petitioner did not raise

this claim in either the court of appeals or the district court, he may not now raise it. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, petitioner has not demonstrated that the government's decision to prosecute him was based on any impermissible consideration, such as race, religion, or political beliefs. See *United States* v. *Batchelder*, 442 U.S. 114, 125 n.9 (1979); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886); *United States* v. *Rice*, 659 F.2d 524, 526-527 (5th Cir. 1981); *United States* v. *Lichenstein*, 610 F.2d 1272, 1281 (5th Cir.), cert. denied, 447 U.S. 907 (1980). Petitioner concedes that other similarly situated persons (*i.e.*, Bolden and Foreman, who also participated in the scheme) were prosecuted, but points out that they received lesser sentences.[4] Petitioner's argument appears to reduce to a claim that the district court improperly imposed a harsher sentence on petitioner because he exercised his right to trial. But the record demonstrates that the sentencing court did not impose a longer sentence because petitioner chose a jury trial; rather, the court reviewed the presentence report, noted the commendable features of petitioner's record, and carefully assessed such relevant variables as the fact that petitioner, as mayor of the town of Tchula, had violated the public trust placed in him by abusing his position for private gain (Feb. 24, 1982 Tr. 34).[5] Thus, petitioner has failed to show any denial of due process. See *United States* v. *Barbara*, 683 F.2d 164 (6th Cir. 1982) (sentence based in part on fact that defendant was a lawyer and that those in fiduciary

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[4]Foreman pleaded guilty to all five counts of the original indictment and received a one-year term of imprisonment and a $10,000 fine. Bolden also pleaded guilty to all five counts and was sentenced to four months' imprisonment and a $1,500 fine.

[5]The sentence imposed by the district court was less than the maximum of four years' imprisonment and a $10,000 fine requested by the government. See Feb. 24, 1982 Tr. 32.

positions are held to a higher standard); *United States* v. *Brubaker*, 663 F.2d 764 (7th Cir. 1981); *United States* v. *Lupo*, 652 F.2d 723, 729 (7th Cir. 1981), cert. denied, 457 U.S. 1135 (1982); *United States* v. *Clements*, 634 F.2d 183, 185 (5th Cir. 1981); *United States* v. *Beecroft*, 608 F.2d 753, 761-762 (9th Cir. 1979).

3. Petitioner next contends (Pet. 38-39) that the trial court erred in admitting evidence of events that occurred after the date the loans were approved, including subsequent negotiations with DPW. He urges that this evidence was irrelevant and prejudicial. That contention is incorrect.

The evidence concerning negotiations with DPW following approval of the loans was highly relevant to show that petitioner knew that the representations to the bank were false. Relevant evidence is any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Although evidence is relevant, a trial court may exclude it in cases in which its "probative value is substantially outweighed by danger of unfair prejudice * * *." Fed. R. Evid. 403. Here, the trial court properly determined that evidence of the post-loan discussions at DPW was more probative than prejudicial. Petitioner's efforts to convince DPW to provide funding for overpriced equipment after he had received his share of the bank loan proceeds were in essence attempts to prevent discovery of his false statements. Thus, his actions following the loan were relevant to show that he knew the statements to the bank were false and thus that he had the specific intent to commit the offense. Moreover, as the court of appeals observed (Pet. App. A3), circumstances surrounding criminal activities are admissible to show the entire scope of an illicit scheme. See *United States* v. *Greene*, 578 F.2d 648,

657 (5th Cir. 1978), cert. denied, 439 U.S. 1133 (1979); Fed. R. Evid. 404(b). Thus, the trial court did not err in admitting the post-loan evidence.

Petitioner also claims (Pet. 40-41) that the trial court impermissibly intervened in the government's behalf during trial, thereby conveying to the jury the impression that petitioner was guilty. Since petitioner did not raise this claim in the court of appeals, he may not argue it now. See *United States* v. *Lovasco, supra,* 431 U.S. at 788 n.7. In any event, there is no substance to petitioner's open-ended claim of judicial misconduct. It is well-settled that a trial judge may question witnesses in order to clarify evidence. See *United States* v. *Jimenez-Diaz,* 659 F.2d 562, 566-567 (5th Cir. 1981), cert. denied, 456 U.S. 907 (1982); Fed. R. Evid. 614(b). Here the record shows that the court diligently questioned witnesses so that they testified in more specific detail; however, there is no indication that the court displayed any appearance of bias towards either party in the course of the questioning (see, *e.g.,* I Tr. 103-104, 108-109, 178, 183, 185-187).

4. Petitioner contends finally (Pet. 43-48) that he received ineffective assistance of counsel. He points, *inter alia,* to his attorney's failure to object to introduction of evidence of events that occurred after the loan approval, to jury instructions, and to the cross-examination of petitioner with respect to his prior conviction for assault.

Initially, we note that petitioner failed to present his claim of ineffective assistance of counsel to the district court, but instead raised it for the first time in the court of appeals.[6] Consideration of such claims often requires

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[6]However, at the sentencing hearing the trial judge expressed the view that petitioner had been "very capably represented by counsel" at trial. Feb. 24, 1982 Tr. 33.

review of evidence outside the trial record. Thus, some courts of appeals have held that a defendant must present claims of ineffective assistance of counsel in a collateral proceeding under 28 U.S.C. (& Supp. V) 2255, so that the district court can create an evidentiary record. See *United States* v. *Frankenberry*, 696 F.2d 239, 241-242 (3d Cir. 1982), petition for cert. pending, No. 82-6301 (filed Feb. 28, 1983); *United States* v. *Sturm*, 671 F.2d 749, 750-751 (3d Cir.), cert. denied, No. 81-6689 (Oct. 4, 1982); *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, No. 81-6716 (Oct. 4, 1982); *United States* v. *Hendricks*, 661 F.2d 38, 43 (5th Cir. 1981); *United States* v. *Lang*, 644 F.2d 1232, 1240 (7th Cir.), cert. denied, 454 U.S. 870 (1981).

Here the court of appeals ruled on petitioner's claim, based on its "thorough review of the entire trial record" (Pet. App. A7). The court concluded correctly that there is nothing in that record to suggest that petitioner was deprived of legal representation "within the range of competence demanded of attorneys in criminal cases" (*McMann* v. *Richardson*, 397 U.S. 759, 771 (1970)), or that he was actually prejudiced by any conceivable ineptitude on his attorney's part. See, *e.g.*, *United States* v. *DeFalco*, 644 F.2d 132, 135 (3d Cir. 1980) (en banc); *DuPree* v. *United States*, 606 F.2d 829, 830-831 (8th Cir. 1979), cert. denied, 445 U.S. 919 (1980).

The court of appeals examined each of petitioner's specific claims of inadequate representation and correctly found each to be without merit. Thus, the court found (Pet. App. A3-A4) that the circumstances surrounding the loan transaction, including subsequent negotiations with the DPW, were admissible to illustrate the scope of the scheme and petitioner's intent. See also pages 7-8, *supra*. The court also found that the trial court's instructions to the jury, taken as a whole, "adequately defined the offenses without

improper prejudice to the defendant" and that there was no need for counsel to object on this score (Pet. App. A5). In addition, there were no grounds for objection to the government's cross-examination on the fact that petitioner had been convicted of assault, a felony for which petitioner had received a 3-year sentence. As the court below observed (*id.* at A4-A5), evidence of such a felony was admissible for impeachment purposes. See Fed. R. Evid. 609.

Petitioner asserts that his claim of ineffective assistance of counsel "deserves full analysis and review" (Pet. 48). That is just what the court of appeals engaged in here, as the basis for its conclusion that petitioner's attorney conducted his defense in a competent manner. For example, as the court of appeals found (Pet. App. A7-A8), petitioner's counsel presented a number of pretrial motions, objected to leading questions by the prosecutor (*e.g.*, I Tr. 99, 105, 110-111, 114, 276), and vigorously attacked the credibility of government witnesses (*e.g.*, I Tr. 122-161, 212-243). Petitioner's counsel successfully persuaded the district court to consolidate into a single offense four of the counts with which petitioner was charged. See page 2, note 1, *supra*. This is simply not a case in which the representation received by petitioner fell below the level expected of a reasonable, competent, and skillful defense attorney. Petitioner's contentions to the contrary do not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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